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The Hon. Thomas O. Rice

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

ERIN FRANKLIN, as an individual  
plaintiff, and the ESTATE OF JOHN  
FRANKLIN, by and through Personal  
Representative Erin Franklin; BROCK  
FRANKLIN; BLAKE FRANKLIN;  
and AVERY FRANKLIN,

Plaintiffs,

v.

INTER-CON SECURITY  
SYSTEMS, INC, and its Parent  
Company TBD, and by and through  
others TBD,

Defendants.

Case No. 2:23-cv-00338-TOR

Spokane County Superior Court  
23-2-04486-32

PLAINTIFFS' REPLY IN  
SUPPORT OF MOTION FOR  
REMAND

Hearing Date: January 22, 2024  
*Without Oral Argument*

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1 Plaintiffs reply in support of their motion for remand (ECF 6) as follows:

2 1. Complete Diversity Does Not Exist.

3  
4 Defendant Inter-Con parent company acknowledges that the Defendant  
5 security guard is a Washington resident, i.e., “the alleged perpetrator was indeed  
6 a local employee.” ECF 7, p. 9:8-9. An acting forum employee defeats diversity  
7 jurisdiction. *Padilla v. AT & T Corp.*, 697 F. Supp. 2d 1156, 1158 (C.D. Cal.  
8 2009) (forum manager and primary actor named as a defendant defeats diversity  
9 jurisdiction). The court may not ignore a resident defendant whose presence  
10 would defeat diversity. *Christison v. Biogen Idec, Inc.*, 2011 WL 13153242, at  
11 \*2 (N.D. Cal. Nov. 14, 2011) (“status of defendants as served or unserved is  
12 irrelevant to the existence of original diversity jurisdiction under 28 U.S.C. §  
13 1332,” and if the plaintiff is a forum resident, the presence of a local defendant  
14 (served or unserved) will preclude removal). Management employees need not  
15 be in the forum to defeat diversity jurisdiction. *Goddard v. Jubilant*  
16 *Hollisterstier, LLC*, 2023 WL 3020494, at \*2 (E.D. Wash. Apr. 20, 2023)  
17 (finding that the defendant parent failed to meet its burden of proof). Complete  
18 diversity fails.

1 Inter-Con's parent also offers no more than conclusory allegations  
2 regarding their local entity— "Defendant is definitely not a 'local forum  
3 business entity.'" ECF 7, p. 7:2 (emphasis in original). This is not sufficient.  
4 Plaintiffs have evidenced the various "Inter-Con" operations throughout  
5 Washington, with discovery intended. ECF 5, paras. 7-14, 16. Defendant's  
6 conclusory evidence does not even establish whether Defendant's principal place  
7 of business is diverse from Plaintiffs' Washington citizenship. Complete  
8 diversity is not established.

12 2. Federal question jurisdiction is waived.

13 Defendant impermissibly raises federal enclave jurisdiction in their  
14 response to a remand motion. "Federal enclave jurisdiction is ...part of a court's  
15 federal question jurisdiction under 28 U.S.C. § 1331." *Blahnik v. BASF Corp.*,  
16 *No. C.A. C-06-410*, 2006 WL 2850113, at \*3 (S.D. Tex. Oct. 3, 2006). A  
17 defendant must, therefore, state federal question jurisdiction as a basis for  
18 removal in its petition for removal, the latter of which must be filed within thirty  
19 days of receiving the complaint. 28 U.S.C. § 1446(b). Defendant Inter-Con  
20 failed to raise federal question jurisdiction in its removal notice, and cannot raise  
21 that basis for removal now. Defendant was served on October 26, 2023. ECF 1,

p. 2:12, *and see* para 5. Defendant filed its removal petition on November 17, 2023, citing diversity as a basis for this Court’s subject matter jurisdiction. ECF 1, ECF 2. Defendant has never amended its notice. A removal petition cannot be amended in any event to add a separate basis for removal jurisdiction after the thirty day period. *O’Halloran v. Univ. of Washington*, 856 F.2d 1375, 1381 (9th Cir. 1988); *and see ARCO Env’tl. Remediation, L.L.C. v. Dep’t of Health & Env’tl. Quality*, 213 F.3d 1108, 1117 (9th Cir.2000); *City of Oakland v. BP PLC*, 969 F.3d 895, 891 (9th Cir. 2020) (“Because the deadline for amending the notices of removal has passed, the Energy Companies may not rely on admiralty jurisdiction as a basis for removal on remand.”). Moreover, Defendant may certainly not raise a new basis for federal jurisdiction by response to a remand motion. *See, e.g., Lydig Const., Inc. v. Carpenters Health and Security Trust of Western Wash.*, 2008 WL 901679, at \*1 (W.D. Wash. Mar. 28, 2008) (“The additional bases for jurisdiction asserted in [the] . . . opposition [to the motion to remand] . . . do not support removal, as neither basis was stated in the Notice of Removal as required by 28 U.S.C. § 1446(a).”). Newly asserted “defenses” to state claims also do not create jurisdiction. *Id.*, ref. *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. California*, 463 U.S. 1, 16 (1983);

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1 *Sullivan v. BNSF Ry. Co.*, 447 F.Supp.2d 1092, 1099-1100 (D. Ariz. 2006)  
 2 (refusing to consider the defendant's alternative ground for removal based on §  
 3 1442(a)(1), because it was raised for the first time in response to the plaintiff's  
 4 motion to remand). Where a defendant raises new grounds for federal  
 5 jurisdiction in its opposition to a motion to remand that were not raised in its  
 6 removal papers, the court should not consider those grounds, which are waived.  
 7  
 8 *Delaney v. Casepro, Inc.*, 2013 WL 3328686, \*3 & n.4 (D.S.C. July 2, 2013)  
 9 (referencing *Sullivan supra*). Defendant's Inter-Con parent company waived  
 10 federal question jurisdiction.  
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13  
 14 3. Defendant has not evidenced federal enclave jurisdiction.

15 Even were the court to impermissibly consider a new basis for removal,  
 16 Defendant has not remotely shown facts establishing federal enclave jurisdiction.  
 17  
 18 If anything, it has shown the opposite.

19 First, Plaintiff's Complaint places the material events on public spaces.  
 20 The events causing injury and death occurred "*near*" the East Hawthorne Road  
 21 address, *not on it*. ECF 1-2, para. 1.17. Defendant's employee was explicitly  
 22 "outside his jurisdiction" on a *public* road when he began pursuing Plaintiffs. *Id.*,  
 23 para. 3.23. Inter-Con's guard drove to Plaintiffs on a public roadway where  
 24  
 25

1 Plaintiffs were on a “small publicly accessible gravel pull-out on the north side  
2 of East Hawthorne Road.” *Id.*, para. 3.12; also see 3.13 (area “fully accessible to  
3 the public traveling on the road, available for people to make U-turns, etc.”), *and*  
4 *see* para. 3.17. A “newly installed” Bonneville Power Administration sign was  
5 in the gravel pull-out, but what parts of that pull-out are owned by a federal  
6 entity, if any, is not in evidence. The shooting event occurred on another publicly  
7 accessible gravel area adjacent to the same public road, on a “BPA parking lot.”  
8 *Id.*, paras. 3.31, 3.34, 3.35. The guard’s unlawful pursuit on public roads outside  
9 his jurisdiction is what forced Plaintiffs onto “BPA property.” *Id.*, paras. 3.34,  
10 3.35. Spokane County law enforcement investigated the incident. ECF 5, paras.  
11 3 and 4. Spokane County’s medical examiner addressed the injury and death. *Id.*,  
12 para. 3.79. The Defendant parent company is also charged with negligent  
13 management of its employees, which did not take place in that gravel access area.  
14 Most likely, training would occur over a private company intranet server, the  
15 location of which remains unknown. No federal entity has asserted jurisdiction  
16 over the criminal investigation or moved to intervene. Moreover, injuries are  
17 caused to Plaintiffs who were nowhere near federal property—Erin, Blake, and  
18 Avery Franklin.

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1 Second, Defendant submits a *Spokane County* property record showing  
2 that the U.S. Department of Energy pays Spokane County taxes under a county  
3 tax code area of “1280.” ECF 8-2, p. 1/3. Federal enclaves are immune from  
4 state taxation, and the status “debar[s] the State from exercising any legislative  
5 authority, including its taxing and police power, in relation to the property and  
6 activities of individuals and corporations within the territory.” *Swords to*  
7 *Plowshares v. Kemp*, 423 F. Supp. 2d 1031, 1034 (N.D. Cal. 2005), *ref. Silas*  
8 *Mason Co. v. Tax Comm’n of Wash.*, 302 U.S. 186, 197 (1937). Moreover,  
9 private contractors on certain federal operations, such as Defendant Inter-Con  
10 here, are subject to Washington law, and taxed under Washington employment  
11 laws. *Ryan v. State*, 188 Wash. 115, 134, 61 P.2d 1276, 1284 (1936), *aff’d sub*  
12 *nom. Silas Mason Co., supra*. Defendant’s property tax evidence thus undercuts  
13 its assertion that these gravel areas are a federal enclave.

14 Third, federal enclave jurisdiction is applied “narrowly,” and it does not  
15 apply where the federal land is incidental to the tortious conduct. “[A] defendant  
16 cannot use activities on federal enclaves to create instant jurisdiction for a state-  
17 law claim.” *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101, 1111 (9th  
18 Cir. 2022), *cert. denied*, 143 S. Ct. 1795 (2023). This case also “involves private

1 parties to a private contract that coincidentally had some nexus to federal  
2 property.” See *Handyman Network, Inc. v. Westinghouse Savannah River Co.,*  
3 *Inc.*, 868 F. Supp. 151, 154-55 (D. S.C. 1994) (“Congress did not intend to  
4 extend federal jurisdiction to such contracts.”). Specifically, Defendant’s private  
5 security guard recklessly chased Spokane County residents down a public road  
6 onto a gravel parking lot “near” the DOE by reckless driving. Plaintiffs were  
7 voluntarily in that parking lot only to prevent a car accident. ECF 1-2, para. 3.34.  
8 Moreover, only state claims are pled. The *Handyman Network, Inc.* court notes  
9 that, as here, "Plaintiff's right to relief does not necessarily depend on the  
10 resolution of a substantial question of federal law. " *Id.*, at 154. State law applies  
11 to the tort claims pled, because “[T]he law on a federal enclave is the state law  
12 that governed the land at the time the federal government established the enclave,  
13 not state law enacted thereafter—unless that law was expressly adopted by the  
14 enclave's new sovereign, the federal government." *Allison*, 689 F.3d at 1235.  
15 Plaintiffs’ causes of action were established by the common law, which became  
16 the law of the state in the year 1862. RCW 4.04.010. Wrongful death actions  
17 were established in 1917. RCW § 4.20.020. The federal land, if any, is incidental  
18 to the events and the claims, and is not properly applied.

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Fourth, federal ownership and use the public pull-out and parking areas “without more (does) not withdraw the lands from the jurisdiction of the state.” *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650 (1930). For the United States to obtain exclusive legislative jurisdiction over a parcel of land, proof of three elements are necessary: 1) purchase of the land by the Government; 2) cession by the State; and 3) acceptance of exclusive jurisdiction by Congress. *See Defenders of Wildlife v. Everson*, 984 F.3d 918, 925 (10th Cir. 2020) (“The federal government may obtain jurisdiction over property through a state’s cession of legislative jurisdiction, coupled with acceptance of the cession by the United States.”); *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1235 (10th Cir. 2012) (“A federal enclave is created when a state cedes jurisdiction over land within its borders to the federal government and Congress accepts that cession.”). The mere fact that the Government holds title to property within the boundaries of a state does not “necessitate the assumption by the Government of the burdens incident to an exclusive jurisdiction.” *Atkinson v. State Tax Commission of Oregon*, 303 U.S. 20, 23 (1938). A grant of jurisdiction by a State to the Federal Government “need not be accepted.” *Humble Pipe Line Co. v. Waggonner*, 376 U.S. 369, 373 (1964). Here, Plaintiffs evidence that the State

1 of Washington's Spokane County law enforcement handled the investigation of  
2 this incident on the publicly accessible gravel area involved, ECF 5, para 3, and  
3 Defendant's County taxation document supports the County's providing law  
4 enforcement services to that area. ECF 8-2. Moreover, unless Washington State  
5 has agreed to the exercise of federal jurisdiction over the parking area in question,  
6 the United States would hold "only the rights of an ordinary proprietor. " *Ft.*  
7 *Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 527 (1885). Where the Federal  
8 Government does not assert exclusive jurisdiction (over public lands), "the State  
9 is free to enforce its criminal and civil laws on those lands. " *Kleppe v. New*  
10 *Mexico*, 426 U.S. 529, 543 (1976); *see also Mendoza v. Neudorfer Engineers,*  
11 *Inc.*, 145 Wn. App. 146, 152 (2008), *ref., e.g., Gulf Offshore Co. v. Mobil Oil*  
12 *Corp.*, 453 U.S. 473, 481 (1981) (holding that "[n]othing inherent in exclusive  
13 federal sovereignty over a territory precludes a state court from entertaining a  
14 personal injury suit concerning events occurring in the territory and governed by  
15 federal law."").  
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22 In sum, Defendant presents no evidence satisfying the complex questions  
23 necessary for this Court to conclude that these publicly accessible gravel areas  
24 are a federal enclave. *See Scott v. Does 1 through 100*, 2012 WL 13013026, at  
25

1 \*2 (C.D. Cal. Oct. 25, 2012), quoting *Celli v. Shoell*, 40 F.3d 324, 328 (10th Cir.  
2 1994). Plaintiffs' motion to remand should be granted.  
3

4 DATED this 5<sup>th</sup> day of January, 2024.

5 MARY SCHULTZ LAW, P.S.  
6

7 /s/Mary Schultz

8 Mary Schultz, WSBA #14198

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 5<sup>th</sup> day of January, 2024, she filed and served the foregoing document to all counsel and parties using the Eastern District of Washington U.S. District Court CM/ECF system, which will automatically serve notice to all attorneys who have appeared in this action and registered with the electronic filing system. Plaintiffs are not aware of any non-CM/ECF participants.

Dated this 5<sup>th</sup> day of January, 2024.

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